

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

BERNARD WHITTINGTON,)	
)	
Plaintiff,)	
)	
v.)	No. 4:18 CV 547 DDN
)	
ANDREW M. SAUL,)	
Commissioner of Social Security,)	
)	
Defendant.)	

MEMORANDUM AND ORDER

Before the Court is the motion of plaintiff Bernard Whittington for an award of attorney's fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). For the reasons set forth below, attorney's fees in the sum of \$4,992.07, less any offset to satisfy pre-existing debt the litigant may owe the United States, are ordered.

BACKGROUND

On May 22, 2017, the ALJ issued a decision that plaintiff was not disabled under Title II of the Social Security Act through December 31, 2008, the last date insured. Plaintiff's sole argument on judicial review was that at Step 3 the ALJ erred by not obtaining a consultative medical expert opinion regarding medical equivalence of plaintiff's back impairment with the requirements of the presumptively disabling condition described by Listing 1.04. Plaintiff argues that the ALJ erred in finding the factors of Listing 1.04 unmet. Listing 1.04 provides:

1.04 *Disorders of the spine* (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including the cauda equina) or the spinal cord.

1.04. On review, this Court concluded that the final decision of the Commissioner must be reversed under Sentence 4 of 42 U.S.C. § 405(g), and it remanded the case to obtain a medical

consultant's opinion regarding whether plaintiff Bernard Whittington met the requirements of Listing 1.04 for his severe spinal impairment on or before December 31, 2008.

DISCUSSION

In support of plaintiff's motion, counsel's staff tracked relevant hours using timekeeping computer software and used the Consumer Price Index to provide an accurate hourly rate measurement in this legal market. (Doc. 20.) In this case, plaintiff signed an agreement assigning any fee under the EAJA to plaintiff's attorney, less any debt owed to the United States by plaintiff. (*Id.*)

In opposition to the motion for attorney's fees, defendant concedes that plaintiff was the prevailing party and that the number of requested hours and requested hourly fee, set out in Doc. 20, appear reasonable. (Doc. 23.) However, defendant argues that its position in the litigation was substantially justified and the plaintiff's application is untimely. The Court disagrees.

In its memorandum opinion, the Court decided that the ALJ erred in not developing the record fully and fairly regarding Listing 1.04. The Court also determined that the ALJ's determination regarding Listing 1.04, stated in one sentence in the ALJ's opinion,¹ was not supported by substantial evidence on the record. (Doc. 18 at 9-10) (describing several examination reports of a positive straight leg raising test, back weakness, loss of sensation at L5 and S1, spinal nerve irritation at several levels, a question of disk disease, and disks protruding at three levels.) Accordingly, the government's position was not justified. Further, the delay in filing was not so long as to prejudice the defendant.

CONCLUSION

Accordingly,

IT IS HEREBY ORDERED that the motion of plaintiff (Doc. 20) for attorney's fees in the sum of \$4,992.07, less any offset to satisfy any pre-existing debt the litigant may owe the United States, **is sustained**.

¹ "The claimant does not meet Listing 1.04 for a spinal disorder because he lacks evidence of nerve root compression, spinal arachnoiditis, or pseudo-claudication of his lumbar spine that results in an inability to ambulate effectively as of the date last insured." (Doc. 9-3 at 18.)

IT IS FURTHER ORDERED after federal debt offset, that the award be made payable to David Hicks, Esq., attorney for the plaintiff, 7720 Stonebridge Golf Drive, Maryville, IL 62062.

/s/ David D. Noce
UNITED STATES MAGISTRATE JUDGE

Signed on March 2, 2020.